Strasburger
ATTORNEYS AT LAW

August 16, 2012

CONSTANCE COURTNEY
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Via Electronic Mail phillips.pam@epa.gov and First Class Mail

Pam Phillips
Acting Division Director
Superfund Division
U.S. EPA Region 6
1445 Ross Avenue
Suite 1200
Dallas, TX 75202

Re: Follow-up to Meeting Regarding Deferral of the Listing of the US Oil Recovery Site in Pasadena, Texas, on the National Priorities List, Docket Number EPA-HQ-SFUND-2011-0653

Dear Ms. Phillips:

On August 1, I received your letter, dated July 24, 2012, in which you responded to the points and issues raised by the U.S. Oil Recovery PRP Group (the "Group") in support of the Group's request that the listing of the U.S. Oil Recovery Site in Pasadena, Texas (the "Site") on the National Priorities List (the "NPL') be deferred until the removal actions at the Site have been completed. These points and issues were raised in a meeting with you on June 28, 2012 and in follow-up correspondence dated July 13, 2012. In addition, to demonstrating its commitment to address the conditions on the Site which provided the impetus for listing, the Group provided, with its July 13, 2012 letter, a schedule and approach for expediting the remaining removal actions. The schedule also proposed accelerating the identification and involvement of the past owner/operators, a step which EPA had previously linked with commencing the Remedial Investigation/Feasibility Study ("RI/FS") after the removal actions were completed.

We hoped that this commitment to the specific necessary removal actions at the Site on an aggressive schedule and the commitment to work with EPA to involve the past owner/operators in discussions regarding the RI/FS would persuade Region 6 to support the Group's request for a deferral of the listing.

In your response, you declined to support a deferral and indicated that the decision has been made to move forward with the final listing of the Site. You indicated that your expectations had not been met. We must assume that this is a reference to your desire for the Group to perform the RI/FS as the quid pro quo for the Region's support. Upon reviewing your response, the Group would like to clarify its position. We are willing to commit to participate in the performance of a RI/FS for the Site provided that other responsible parties, clearly associated with the conditions on the Site, are also included.

The Group is believes that it is inappropriate for a group of potentially responsible parties associated with one brief period of the long history of the Site to be required to fund and perform investigative work regarding conditions that it did not cause. Parties who are responsible for all site conditions should be included. The prior owners and operators of the Site, that are responsible for any conditions predating the USOR operations, have not yet been asked to participate in discussions that could lead to a more balanced and appropriate participation in the RI/FS process. For example, the Group is aware that Rhodia and the City of Pasadena are past owner/operators of portions of the Site. The attached documentation confirms that these entities may be responsible for contamination at and adjacent to the Site.

There are other former owner/operators of the Site as well. At its expense, the Group has engaged a consultant to perform a Phase 1 Environmental Site Assessment ("Phase 1") focused on identifying former owners and operators and the nature of their involvement at the site. Upon completion of the Phase 1, the Group will provide a copy of the findings and supporting information to Region 6. This should provide the basis for including these additional liable parties in the discussions regarding the RI/FS.

On Thursday, August 9, we learned that the agency intends to issue Special Notice Letters ("SNLs") to potentially responsible parties in order to commence a formal negotiation process regarding performance of the RI/FS. The Group has been asked to provide information to EPA regarding potentially responsible parties and their involvement at the site. While the timing of this announcement is somewhat confusing given the agency's earlier statements regarding the sequencing of activities at the Site, we are gratified to learn that the agency intends to include prior owners and operators in this process. The information we are developing through the Phase 1 should assist the agency in its efforts to identify and include these parties. As to the agency's request for information regarding customers of USOR, we will be working closely with your staff to

learn what the agency needs and whether that information is available from the materials we have reviewed.

As you know, a key consideration in proceeding with the RI/FS is sequencing the field work of the investigation with the remaining removal actions. We have a number of ideas and concerns regarding this process. Our technical team will be working closely with yours in the coming weeks to review these issues. Do not doubt the Group's resolve to participate in the RI/FS process. The reservations we have expressed have been with regard to technical constraints posed by the remaining removal actions and the need for full involvement of parties potentially liable for conditions that will be assessed in the RI/FS.

As you are probably aware, representatives of the Group had a chance meeting with Acting Regional Administrator Coleman during the recent Environmental Superconference in Austin. He encouraged the Group to continue our work with you to define a program of action that would justify the Region's support of our request to defer the listing. Toward that end the Group would like you to consider the following additional initiatives:

1. The Group is committed to working diligently with the Region to identify and involve the prior Site owner/operators. The Phase 1 report and supporting information will be provided to the Region in the next thirty (30) days.
2. We ask that the Region consider focusing the SNL process on the prior Site owner/operators and recalcitrant parties. These are the parties that need both the encouragement of the SNL and a time line for involvement. The Group's commitment to involvement in the process is clearly established. An SNL to Group members or small volume parties which neither the agency nor the Group have engaged would only serve to complicate the negotiation process. Focusing the SNL effort will also conserve resources of both the agency and the Group. Such a focused approach is also consistent with agency guidance that states that the SNL process is not appropriate when there are on-going negotiations. The Group's initiatives and transparent work with the Region demonstrate such an on-going relationship exists between the Group and EPA.
3. A technical meeting with the Region regarding the possible investigative steps that might be conducted in the course of the removal actions and coordinating those steps with the RI/FS should take place in the immediate future. For example, sampling could be conducted in the area of the bioreactor and containment pond and in areas where roll-off containers have been stored in

conjunction with removal actions addressing those aspects of the site. The removal actions at two of the three areas are already underway. These data could be incorporated in the RI/FS process when that commences, thus speeding the data gathering process. There may be other areas where the RI/FS can proceed concurrently with the necessary removal actions. The technical discussions can identify these opportunities.

We believe this Site affords the Group and the agency the opportunity to work together in developing a timely and effective approach to conditions at the Site. We are committed to that process. The Group's actions demonstrate that commitment. After you have had an opportunity to consider this response, we propose a meeting to discuss the path forward with you and your staff.

Sincerely,

Constance Courtney Westfall
Co-Chair, U.S. Oil Recovery Site, PRP Group

CCW:ct
Enclosures

cc: ***VIA EMAIL***
Ed Quinones, Assistant Regional Counsel, EPA Region 6
Beth Seaton, TCEQ, Director, Remediation Division
Ashley K. Wadick, TCEQ, Regional Director, Houston Regional Office
Charmaine Backens, TCEQ, Litigation Division
Heather D. Hunziker, Texas Attorney General's Office
Bob Allen, Harris County Pollution Control Services
Rock Owens, Harris County Attorney's Office
Eva S. Engelhart, Ross, Banks, May, Cron and Cavin, P.C.

HARRIS COUNTY
POLLUTION CONTROL
DEPARTMENT

A. R. PEIRCE
DIRECTOR

April 27, 1983

Mr. Ray Hardy
Harris County District Clerk
Room 400
301 Fannin
Houston, Texas 77002

Attention: Mr. Tom Love

Dear Mr. Hardy:

It is requested that this department be provided with a copy of the court order issued in connection with Cause No. 853872. This injunction was signed sometime in 1971. Our need for a copy of this order stems from a fire which destroyed a sizable portion of our files during October, 1981.

Your assistance will be greatly appreciated.

Very truly yours,

A. R. Peirce
Director

ARP/lb

Re: Rhodia

107 NORTH MUNGER • P.O. BOX 6031 • PASADENA, TEXAS 77506 • (713) 920-2831

fore us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

It is true that fairness doctrine obligations can be met by public service programs which do give reasonable vent to points of view contrary to those reflected in the offending commercials. The Commission recognized this principle in the decision now under review, and noted that the licensee had listed programs carried by it as allegedly discharging this responsibility. The Commission, however, explicitly restricted the basis of its ruling to the inapplicability of the fairness doctrine; and it did not regard as being before it for decision the question of whether the licensee had otherwise met its fairness obligations. It indicated that this was a matter which was properly to be explored at license renewal time.

The fairness doctrine does not, of course, operate on that kind of a time schedule, as the Commission's most recent decision in the *Esso* case demonstrates. There, once the Commission found the fairness doctrine to be applicable, it directed its attention to the question of whether compliance had in effect been forthcoming by virtue of other programs aired by the licensee. Since the information before it on this point was scanty, the Commission was compelled to find the programs cited as falling short of an adequate presentation of contrasting views. It did, however, give the licensee an opportunity within 10 days to submit further information on this score.

The disposition we make here follows the *Esso* approach. Having found this case indistinguishable from *Banzhaf* in the reach of the fairness doctrine, and being without the benefit of an express finding by the Commission on the question of the possible satisfaction of that doctrine by the licensee through the medium of other programs, we remand the case to the Commission for determination by it of this second issue.[4]

It is so ordered.

WILBUR K. MILLER, *Senior Circuit Judge*, would affirm.

[4] In Green v. FCC and Pizzo v. FCC (Nos. 24,470 and 24,516, decided June 18, 1971), this court left undisturbed the Commission's disallowance of a fairness doctrine complaint about military recruitment advertisements. There, however, the petitioners persisted in linking their complaints about the advertisements to the controversial issues of the Vietnam War and the draft; and the Commission found expressly that the licensees had not "failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine."

RHODIA v. HARRIS COUNTY

Texas Court of Civil Appeals
First Supreme Judicial District

RHODIA, INC., v. HARRIS COUNTY, et al., No. 15,784, August 5, 1971

WATER

Federal, state, and local regulation — In general (§28.01)

Federal, state, and local regulation — Water quality standards (§28.14)

Liability by industry — Pesticides (§32.71)

Court jurisdiction and procedure — Injunctions (§40.71)

Temporary mandatory injunction under Texas Water Quality Act requiring chemical company to prevent arsenic waste from entering public waters and to clean up arsenic on land around and adjacent to company is modified to require only prevention of excessive amounts of arsenic from entering public waters, and not requiring clean-up of land, since temporary injunction should not go any further than is necessary to preserve status quo.

Stanley D. Baskin, Baskin, Fakes & Stanton, Pasedena, Tex., for appellant.

Joe Resweber, county attorney, Gus Drake, assistant county attorney, and James R. Doxey, assistant county attorney, all of Houston, and Crawford C. Martin, attorney general, and A.J. Galerano, assistant attorney general, both of Austin, Tex., for the appellees.

Full Text of Opinion

PEDEN, J.:

Appeal from the granting of a temporary mandatory injunction against Rhodia, Inc., a chemical company which produces insecticides, weed killers and similar products containing arsenic.

Harris County brought this cause of action under the Texas Water Quality Act, Article 7621 d-1, Vernon's Texas Civil Statutes, seeking temporary and permanent injunctions and civil penalties, charging that Rhodia was discharging wastes containing excessive arsenic into or adjacent to Vince Bayou, one of the public waters of Texas. The Texas Water Quality Board filed an intervention in which it also sought to have Rhodia enjoined from unauthorized discharges of wastes containing arsenic in violation of the Act.

The appellant does not complain of the

provisions of T.R.C.P. Rule #1012 below

trial court's having ordered, after a hearing, that Rhodia be temporarily enjoined from all activities at its plant which will produce arsenic laden water drainage into or adjacent to, the waters of Vince Bayou, a public body of water near the Rhodia plant. Rhodia's appeal is directed to the following mandatory provisions in the temporary injunction:

"Further, that the Defendant, Rhodia, Inc., is hereby ORDERED forthwith to:

"1. Repair in a good and workmanlike manner with tamped, arsenic free soil those breeches existing in the high ground separating Vince Bayou from the tidal flats adjacent to Defendant's property. Place such additional dikes as are necessary to prevent the entry of water into such tidal flats at periods of high tide.

"2. Core that portion of property owned by Houston Lighting & Power Company to the North and East, immediately adjacent and contiguous to the land owned by the Defendant at intervals of 25 feet to such a depth as is necessary to achieve arsenic free soil, filling the core holes with a solution of slaked lime. Remove all arsenically contaminated top soil and replace same with that by-product or waste product from cement manufacturing processes known as 'precipitator dust' to a depth of four inches. After which the arsenically contaminated soil removed from the Houston Lighting & Power Company property may be replaced on top of the aforesaid 'precipitator dust.'

"3. Core the perimeter of the Defendant's property on the South and West boundary at 50' intervals to a depth of one foot or until arsenic free soil is achieved.

"4. Core the East perimeter of Defendant's property from the Southern boundary line to the entrance leading to Defendant's plant site at intervals of 50' to a depth of one foot or until arsenic free soil is achieved.

"5. Core the remainder of the East boundary line and the North boundary line at intervals of 25' to a depth of 2' or until arsenic free soil is achieved.

"6. Core the portion of Defendant's property South of the Southern most building thereon at 50' intervals (not previously cored) to a depth of 1' or until arsenic free soil is achieved, being the South 150' of said property.

"7. Core, on a line not more than 4' from all concrete buildings, dikes and other operating areas on Defendant's property, at intervals of 25' to a depth of 2' or until arsenic free soil is achieved. On a line parallel to such line, not separated more than 25' from such line and further removed from said concrete buildings, dikes and other operating areas, core at intervals of 25' to a depth of 2' or until arsenic free soil is achieved.

"8. Remove the arsenically contaminated soil from the slag waste pile, located on the Northerly side of Defendant's property and the Southerly side of the adjoining property owned by Houston Lighting & Power Company, the evaporation pit area, located on Defendant's property, and the railroad spur line unloading area and place in a good and workmanlike manner on the previously prepared tidal flat areas described in # 1 hereof.

"9. Fill all core holes with slaked lime solution.

"10. All core holes mentioned herein are to be 4" in diameter.

"11. Determine the source of the water surfacing in the artesian spring located ten feet North of the North end of the Defendant's railroad spur track.

"12. Cover replaced soil and all areas from which soil is removed with arsenic free compacted earth to a depth of natural ground level. The surface of these areas should be graded smooth in such a manner as to allow proper drainage and not cover any currently exposed transmission tower foundations or footings. These areas should be seeded thereafter with Bermuda grasses so as to avoid erosion."

No findings of fact or conclusions of law were made in addition to those stated in the trial court's order.

At the hearing on the applications for temporary injunction, evidence was introduced that arsenic in excess of the concentration permitted by the "Hazardous Metals Regulation" of the Texas Water Quality Board (one part per million) had been found in the tidal waters of Vince Bayou where natural drainage from the Rhodia plant would carry it and in the fluids being discharged from the Rhodia plant into the City of Pasadena sewer system. There was evidence that the arsenic found in the sewer system originated in the operation of the plant and that it would also eventually reach Vince Bayou but that it would by then be less concentrated. There was also evidence that excessive concentrations of arsenic were found in Vince Bayou as a result of a recent purging of the plant's sprinkler system. However, it appeared from the evidence that one of the principle sources of arsenic in the bayou was that which had, at some time in the past, been deposited on the properties of both Rhodia and the adjacent property of Houston Lighting & Power Co. by operation of Rhodia's plant and was being washed into the bayou by rains and by high tides. Large concentrations of arsenic were found on and in the soil of Rhodia's plant and

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Rhodia's corporate predecessor formerly had permission from the Texas Water Quality Board to dump certain of its wastes containing arsenic in a pit and a ditch on its own property, but it sought and obtained cancellation of its permits in 1969 because it had developed a recycling system for its wastes and no longer wished to dump them. It did not appear from the evidence that Rhodia is now knowingly depositing arsenic on the land or in the bayou.

In 1947 Rhodia's predecessor conveyed to Houston Lighting & Power Co. a 4.761 acre strip of land on the north and east sides of the Rhodia plant. Vince Bayou flows across the northeast part of both the Rhodia and the Houston Lighting & Power Co. tracts, and the evidence showed that after rains the natural drainage flow of surface water from parts of the Rhodia land was across the Houston Lighting & Power Co. tract into and adjacent to Vince Bayou.

Rhodia's single point of error is:

"The trial court abused its discretion in issuing a temporary mandatory injunction in that:

"A. It placed on appellant a burden greater than required for the protection of appellees.

"B. It granted all of the relief available to appellees on the trial on its merits.

"C. It granted equitable relief though appellees had an adequate remedy at law.

"D. It granted equitable relief which was in excess of that requested in the petitions and prayers.

"E. It required appellant to perform burdensome duties that were not described in appellee's petitions and prayers, violating the due process and equal protection clauses of the Texas and United States Constitution."

In a hearing on an application for a temporary injunction the only question before the court is the right of the applicant to a preservation of the status quo of the subject matter of the suit pending a final trial of the case on its merits. To warrant the issuance of the writ, the applicant need only show a probable right and a probable injury; he is not required to establish that he will finally prevail in the litigation. Where the pleadings and the evidence present a case of probable right and probable injury, the trial court is clothed with broad discretion in determining whether to issue the writ and its order will be reversed only on a showing of a clear abuse of discretion. Transport Co. of Texas v. Robertson Transports, 261 S.W.2d 549 (Tex. Sup. 1953).

Although ordinarily a mandatory injunction will not be granted before final hearing, a trial court has the power to grant a mandatory injunction at a hearing for a temporary injunction where the circumstances justify it. Whether a temporary mandatory injunction will be granted is within the sound discretion of the trial court. The grant thereof will be denied, however, unless the right thereto is clear and compelling and a case of extreme necessity or hardship is presented. 31 Tex.Jur.2d 85, Injunction, § 32.

Generally, the preservation of the status quo can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury on complainant. In such a case, courts of equity issue mandatory writs before the case is heard on its merits. This character of cases had been repeatedly held to constitute an exception to the general rule that temporary injunction may not be resorted to to obtain all relief sought in the main action; such temporary injunction may be mandatory in character. McMurrey Refining Co. v. State, 149 S.W.2d 276 (Tex. Civ. App. 1941, writ ref.).

The status quo was an unpolluted river. We are not dealing merely with the threat of irreparable injury when pollution of public waters is shown; the irreparable injury has been demonstrated. Magnolia Petroleum Co. v. State, 218 S.W.2d 855 (Tex. Civ. App. 1949, writ ref.n.r.e.).

We sustain Section A of the appellant's point of error, having concluded that there should be a modification of the mandatory provisions of the temporary order. A temporary injunction preserves the status quo until final hearing, and it should go no further than equity requires. 31 Tex.Jur.2d 48, Injunctions, § 12; Cozby v. Armstrong, 191 S.W.2d 786 (Tex. Civ. App. 1945 no writ); Texas Co. v. Watkins, 82 S.W.2d 1079 (Tex. Civ. App. 1935, no writ); Dallas General Drivers, etc. v. Wamix, Inc., of Dallas, 295 S.W.2d 873 (Tex. Sup. 1956).

We consider that it was necessary for the order to contain some mandatory provisions; that part of it (not complained about on this appeal) which required Rhodia to cease all activities which produce arsenic-laden water drainage was not sufficient to prevent arsenic from reaching public waters from the Rhodia plant in excessive concentrations. As we have noticed, arsenic was already on and in the ground at the plant and was being picked up

and put into the bayou by surface water drainage and by high tides.

But Rhodia does not violate the Texas Water Quality Act by having arsenic on its land. At one time it had permits to dump its arsenic wastes there. It is Rhodia's allowing this arsenic to pollute public waters that is to be enjoined. How to do so under a temporary order before a full trial on the merits is a difficult problem. The appellees have shown that irreparable injury is occurring and that a statute is being violated, and they are entitled to a temporary mandatory injunction which will require Rhodia to prevent excessive quantities of arsenic from polluting the public water in the manner in which the appellees have shown Rhodia has done so. The appellees are not entitled to more than this pending a final trial.

Stated another way, under the evidence it would have been proper, pending trial on the merits, to include in the order a provision requiring Rhodia to prevent surface water and tidal water from directly or indirectly carrying arsenic in concentrations of more than one part per million into or adjacent to Vince Bayou from Rhodia's property; the provisions of the trial court's order requiring Rhodia (on its own land) to repair breaches in the high ground, to build additional dikes and to determine the source of the "artesian spring" were directed to this end. It should be left to Rhodia to determine how it might best make certain the proven pollution was stopped.

Much of the work which Rhodia was ordered to do in response to the mandatory provisions of the temporary injunction is on the land owned by the Houston Lighting & Power Co., which company is not a party to this suit. The appellant raises this matter under another Section (E) of its brief, but it is not necessary for one who appeals from an order in temporary injunction proceedings to even file a brief, and assignments of error, need not be included in any brief filed. Lowe and Archer, Injunctions and other Extraordinary Proceedings (1957) 388-9, § 363. Since the utility company was not a party to the suit, the trial court did not have jurisdiction over its land and thus lacked authority to enforce its order that Rhodia go onto and perform operations affecting such land. "Jurisdiction is the power to hear and determine the matter in controversy according to established rules of law, and to carry the sentence or judgment of the court into execution." Cleveland v. Ward, 285 S.W. 1063 (Tex. Sup. 1926).

It is conceivable that should Rhodia elect to respond to a mandatory provision such as we have stated by diverting or impounding surface waters, this might give rise to a cause of action by the utility company against Rhodia under the provisions of Art. 7589a, Texas Civil Statutes, if the diversion or impounding damaged the utility company's land. No evidence was presented in the trial court touching on the attitude of that company in this regard, and almost none to indicate whether the company's property might be damaged by Rhodia's taking such action.

When he was asked about possible solutions of problems of the nature encountered in this case, the appellees' expert witness, Dr. Walter A. Quebedeaux, Director of the Pollution Control Department of Harris County, testified that he felt that it is his duty to make such suggestions to the plant in question, but that the actual choice of the method is the duty of the plant. He then testified in detail as to his recommendations, and they comprise the mandatory provisions of the trial court's temporary injunction.

It may be that Rhodia will prefer to follow Dr. Quebedeaux's suggestions as to its land and effect a permanent solution to the problem rather than a temporary one which it might devise, such as placing a temporary covering over its land, but we hold that until there has been an opportunity for a trial of the case on the merits, the appellees are entitled only to have Rhodia stop the flow of arsenic into and adjacent to the public waters and that it was an abuse of discretion for the trial court to order, as temporary relief, that Rhodia engage in extensive coring procedures to discover where arsenic is located, that any arsenic-bearing soil be removed, a neutralizing product be added, the arsenic-bearing soil be replaced, that it be covered with compacted earth and seeded with Bermuda grass, both on its own land and on that of Houston Lighting & Power Co.

In its brief Rhodia relates that is has already complied with a number of the trial court's mandatory provisions and complains of the expense to which it has been and will be put, but evidence of this was not presented in the trial court and is not properly before us on this appeal.

We overrule Section B of Rhodia's point of error on authority of the rule stated in McMurrey Refining Co. v. State, supra, which we have noticed.

We find no merit in Section C of appellant's point of error. Rhodia argues that since the Water Quality Act provides for fines and they constitute an adequate remedy at law, the trial court should not have granted the equitable relief of injunction. Sec. 4.02 (a) of the Act specifically provides for both the rem-

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edies of injunction and civil penalty, and it is clear that under the evidence in this case the trial court was entitled to make the presumed finding that the depositing of arsenic in public waters in the concentrations found is so dangerous as to constitute irreparable injury.

We overrule Sections D and E of Rhodia's point of error. It is true that Harris County did not seek mandatory relief in its application, but the petition of the Texas Water Quality Board asked, in the alternative, that Rhodia be enjoined to take such steps as are necessary to alleviate and/or abate the polluted condition of the public water. The record does not reflect that any special exceptions were directed to such pleading or were urged upon the court. We hold that under the provisions of Rule 90, Texas Rules of Civil Procedure, the "defect, omission or fault", if any, of the Water Quality Board's petition in not pleading more specifically as to the type of mandatory relief sought, was waived. McKee v. City of Mt. Pleasant, 328 S.W.2d 22[illegible] (Tex. Civ. App. 1958, no writ); Hice v. Cole, 295 S.W.2d 661 (Tex. Civ. App. 1956, no writ).

It is clear that Rhodia received due notice of the allegations and proceedings in question and that a full and extended hearing was held before the trial court issued its order. We find no denial of due process.

We modify the mandatory provisions of the trial court's temporary injunction by substituting for them: Rhodia, Inc., is enjoined during the pendency of this suit to take whatever steps are necessary to prevent surface waters and tidal waters from directly or indirectly carrying arsenic in concentrations of more than one part per million from Rhodia's property into or adjacent to Vince Bayou.

The order of the trial court is, as thus modified, affirmed.

CONSOLIDATED EDISON v. SCENIC HUDSON

U.S. Supreme Court

CONSOLIDATED EDISON CO. OF NEW YORK, INC. v. SCENIC HUDSON PRESERVATION CONFERENCE, et al., No. 1159, May 16, 1966 [384 U.S. 941]

Petition for writ of certiorari to U.S. Court of Appeals for Second Circuit denied; opinion below: 1 ERC 1084.

BISHOP PROCESSING v. U.S.

U.S. Supreme Court

BISHOP PROCESSING CO. v. UNITED STATES, No. 1378, May 8, 1970 [398 U.S. 905]

Petition for writ of certiorari to U.S. Court of Appeals for Fourth Circuit denied; opinion below: 1 ERC 1013.

VOLPE v. CITIZENS COMMITTEE

U.S. Supreme Court

VOLPE v. CITIZENS COMMITTEE FOR THE HUDSON VALLEY, No. 615, December 7, 1970 [400 U.S. 949]

Petition for writ of certiorari to U.S. Court of Appeals for Second Circuit denied; opinion below: 1 ERC 1237.

SANTA BARBARA v. MALLEY

U.S. Supreme Court

COUNTY OF SANTA BARBARA v. MALLEY, No. 695, January 11, 1971 [400 U.S. 999]

Petition for writ of certiorari to U.S. Court of Appeals for Ninth Circuit denied; opinions below: 1 ERC 1285, 1288.

ZABEL v. TABB

U.S. Supreme Court

ZABEL v. TABB, No. 955, February 22, 1971 [401 U.S. 910]

Petition for writ of certiorari to U.S. Court of Appeals for Fifth Circuit denied; opinion below: 1 ERC 1449.

IN THE COURT OF CIVIL APPEALS

FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

THE STATE OF TEXAS,

To the District Court of Harris County, Greeting:

Before our Court of Civil Appeals, on the 5th day of August, A. D. 1971, the cause upon appeal to revise or reverse your Judgment between

RHODIA, INC., APPELLANT,

No. 15784 vs. From Harris County
Tr. Ct. No. 853,872
Opinion by Peden, J

HARRIS COUNTY ET AL, APPELLEE

was determined; and therein our said Court of Civil Appeals made its order in these words:

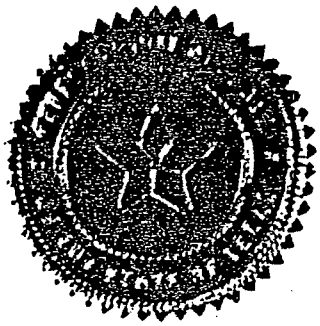
"This cause, being an appeal from an order granting a temporary injunction, rendered and entered by the court below on March 5, 1971, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment in ordering that Rhodia, Inc. forthwith perform fourteen enumerated tasks during the pendency of this cause, or until further orders of this Court, it is therefore considered, adjudged and ordered that the judgment of the court below be modified as follows: the fourteen enumerated tasks are deleted from the order, and Rhodia, Inc. is enjoined during the pendency of this suit to take whatever steps are necessary to prevent surface waters and tidal waters from directly or indirectly carrying arsenic in concentrations of more than one part per million from Rhodia's property into or adjacent to Vince Bayou.

"And because it is further the opinion of this Court that there was no error in the judgment of the court below except as hereinabove modified, it is therefore considered, adjudged and ordered that the judgment of the court below, except as hereinabove modified, be affirmed.

"It is further ordered that the appellant, Rhodia, Inc. and its surety, United States Fidelity & Guaranty Company, pay one-half (1/2) of the costs incurred by reason of this appeal; and it is further ordered that the appellees, Harris County, and the State of Texas, pay the remaining one-half (1/2) of the costs of this appeal.

"It is further ordered that this decision be certified below for observance."

WHEREFORE, we command you to observe the Order of our Court of Civil Appeals, in this behalf; and in all things to have it duly recognized, obeyed and executed.



WITNESS, The Hon. SPURGEON E. BELL, Chief Justice of our Said Court of Civil Appeals, with the Seal thereof annexed, at HOUSTON, this the 13th day of September A.D. 1971

MARIBELLE REICH Clerk.

By Sherine O'Sullivan Deputy.

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RECEIVED FEB 14 1978

005531

TEXAS AIR CONTROL BOARD
SOURCE INVESTIGATION SYSTEM

ACCOUNT NUMBER 111-304-6

Date of Investigation 12 / 21 / 77

Form No. SIS-2

PERMANENT SOURCE INFORMATION

01 Action Code C | County Harris | Jurisdiction 070 | Source Status: AA ☐ EX ☐ DA ☐

Company Name, Location, Mailing Address	Facility Type	Enter Y or N in each box	Significant Pollutants
02 Rhodia Inc	Portable Unit	N	
03 Chipman Division	Federal Facility	N	
04 400 N. Richey	NSPS	N	PA N
05 Box 6272	NESHAPS	N	SO_2 N
06 Pasadena, Texas 77502	EPA Major Source	N	HC N
07	EPA Minor Source	N	CO N
08	Other	N	Other

09 Group 19 | Business/Products General Chemicals

INVESTIGATION DATA

10 INVESTIGATIONS: Agency Comment | Alternate Method | Burning | Permit | (Permit No.)

Complaint | NSPS | NESHAPS | Observed Sample | Progress Report | Order

Sampling | Rule 7&8 | SIP 1 | Source Surveillance | Other

11 Investigator Codes 070 | Technical Report | Source

12 Management | Title | Phone ( ) –

13 Person Contacted | Title | Phone ( ) –

14 Complaint No. | Date Received / / | Odor | Smoke | Dust | Other

15 Complaint No. | Date Received / / | Odor | Smoke | Dust | Other

Findings: Confirmed | Unconfirmed | Odor | Smoke | Dust | Other | Cause

REPRESENTATIVE SAMPLES — Sampling Results To Follow: Yes ☐ No ☐

	Type	Source	Pollutant	Time	Actual	Allowable	% of Max.	% of Norm.
16								
17								
18								

Emission Rate Code: lb/hr-01; lb/D-02; T/Y-03; SCFM-04; PPM-05; PPB-06; $\mu g/M^3$-07; GR/SCF-08; lb/MBTU-09; %-10; None-11

19 Emissions Status: In Compliance ☐ Noncompliance ☐ Short-Term Noncompliance ☐ Undetermined ☐

If Undetermined, why? Plant Down ☐ Partial Operation ☐ Needs Sample ☐ Upset or Maintenance ☐ Other

20 Violations: Rule | Rule | Rule | Order | TCAA

21 Source | Source | Source | Source | Source

ADMINISTRATION

22 Scheduled Action: Date / / Comments No longer in business

23 Date / / Comments

24 Date / / Comments

25 Compliance Action Recommended: Yes ☐ No X | Abatement Letter Sent: Yes ☐ No X

Emissions Inventory Form Needed: Yes ☐ No X | EI accurate: Yes ☐ No ☐ Undetermined ☐ | Photos: Yes ☐ No X

Permits: Approve ☐ Deny ☐ Exempt ☐ Hold ☐ Discuss ☐ Engineer

Investigator(s) | 1/10/78 Date | Approved By

Page 1 of 1 Pages

cr

FILE

NO. 853,872

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

157th JUDICIAL DISTRICT

HARRIS COUNTY, ET AL
Plaintiffs

v.

RHODIA, INC.
Defendant

ORDER, JUDGMENT AND DECREE

BE IT REMEMBERED that on the 9th day of August, 1971, came on to be heard the above entitled and numbered cause wherein Harris County and the Texas Water Quality Board are Plaintiffs and Rhodia, Inc., is Defendant; and all parties hereto having appeared and announced ready for trial, and a jury having been expressly waived in open Court by all of said parties, all matters in controversy, both of fact as well as of law, were submitted to the Court; whereupon the pleadings and the evidence adduced by the parties hereto and the arguments and statements of counsel were heard by the Court; and it appearing to the Court that the County and State's recommendation that the Defendant, Rhodia, Inc., be assessed a penalty of $13,750.00 for the violations of the Texas Water Quality Act adduced in evidence, being fourteen in number, is proper; said penalties to be paid $6,875.00 to Harris County, in care of its County Attorney, and $6,875.00 to the State of Texas, in care of its Attorney General, in full, complete and final resolution of all demands, claims, actions and causes of action for penalties asserted or held by said Plaintiffs against the Defendant and each of the Plaintiffs acknowledges such payment in full, final and complete resolution of all demands, claims, actions asserted herein by Plaintiffs against said Defendant for penalties under the Texas Water Quality Act by virtue of the actions alleged in the petition and intervention herein preceding this judgment.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Plaintiffs, Harris County and the State of Texas do have and recover of and from the Defendant, Rhodia, Inc., the total sum of $13,750.00, to be paid one-half to the Treasurer of the State of Texas and one-half to the Treasurer

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of Harris County, and delivered to the Attorney General of Texas and the County Attorney of Harris County, and that the payment of such sums shall bar any further recovery by said Plaintiffs, or either of them, for any and all demands, claims, actions or causes of action asserted or held by said Plaintiffs by virtue of the actions alleged in the petition and intervention, herein preceding this judgment.

And it further appearing to the Court that the work performed at the Defendant's plant site has been substantially performed and all parties hereto, Harris County, the Texas Water Quality Board and Rhodia, Inc., have stipulated and agreed that a permanent injunction (as set out below) should be entered herein:

It is therefore ORDERED and DECREED by the Court that the Defendant Rhodia, Inc., shall, from the date of entry hereof, cease, desist and terminate any and all discharge of industrial waste from its property (at 400 North Richey Street, Pasadena, Texas) into or adjacent to the waters of Vince Bayou in Harris County, Texas; That the Defendants' said property is more particularly described as follows:

> 18.24 acres of land out of the William Vince Survey, Abstract 78, Harris County, Texas, otherwise known as Lots 5 and 6 of Pasadena Outlot No. 35, and more particularly described by metes and bounds as follows, to-wit:
>
> BEGINNING on the West boundary line of Richey Street, a 40 foot wide street, on the North right of way line of the Public Belt Rail Road, set 1/2" iron pipe for corner and a point of beginning;
>
> THENCE North along the West boundary line of Richey Street, at 895 feet, cross Vinces Bayou, 1250.0 feet in all to the South line of Second Street, set a 1/2" iron pipe for corner;
>
> THENCE West along the South boundary line of Second Street (a 40 foot street) at 302 feet, cross Vinces Bayou, 640.0 feet in all to a fence on the West line of Lot 5 and the East line of Lot 4, set a 1/2" iron pipe for corner;
>
> THENCE south along the West line of Lots 5 and 6, 1250.0 feet to the North right of way line of the Public Belt Rail Road, set 1/2" iron pipe for corner;
>
> THENCE East along the North right of way line of the Public Belt Railroad 640.0 feet to the PLACE OF BEGINNING,

as described in an instrument filed in Volume 1563, page 482, of the Deed Records of Harris County, Texas, the Defendant having conveyed portions of the above described tract to Houston Lighting & Power Company and Texas Pipeline Company, said reductions from the original tract of the Defendant, Rhodia, Inc., being more particularly described as follows:

All that certain tract or parcel of land containing four and seven hundred sixty-one thousandths (4.761) acres out of Lots No. Five (5) and Six (6) in Block No. Thirty-five (35) of Pasadena Outlots in the Wm. Vince Survey, Abstract No. 78, in Harris County, Texas, as per map of said Pasadena Outlots recorded in Volume 93, Pages 21 to 28 of the Deed Records of Harris County, Texas, and being out of a 27.63 acre tract described in deed dated September 6, 1922, from James A. Stephens et ux to Stauffer Chemical Company and recorded in Volume 516, Page 28, of the Deed Records of Harris County, Texas, said 4.761 acres is described by metes and bounds as follows, all coordinates and bearings being referred to the Texas Plane Coordinate System, South Central Zone, as established by the U.S. Coast and Geodetic Survey in 1934 and based on the position of U.S.C.&G.S. triangulation station "Buffalo-1931" x = 3,201,882.4; y = 707,069.3:

BEGINNING at a 1-inch galvanized iron pipe with coordinate x = 3,199,682.4; y = 704,103.8 set in the west line of Richey Street based on 40.0 feet in width and in the east line of said Lot No. 6, said pipe being located N 2° 26' 30" W 223.23 feet from the center line of the main line tract of the Navigation District Railroad;

THENCE from the point of beginning N 19° 57' 20" W 466.07 ft. to a 1-inch galvanized iron pipe for corner at a point 140.0 ft. westerly at right angles from the west line of said Richey Street;

THENCE parallel to and 140.0 ft. westerly at right angles from the west line of said Richey Street N 2° 28' 30" W 458.04 ft. to a point for corner in Vince's Bayou at a point 172.0 ft. southerly at right angles from the south line of Second Street;

THENCE parallel to and 172.0 ft. southerly at right angles from the south line of said Second Street S 87° 37' 10" W 512.07 ft. to a 1-inch galvanized iron pipe for corner in the west line of said Lot No. 5 as fenced;

THENCE with the west line of said Lot No. 5 as fenced N 2° 28' 00" W 172.0 ft. to a 1'inch galvanized iron pipe for corner in the south line of Second Street said pipe also marking the northwest corner of said Lot No. 5;

THENCE with the north line of said Lot No. 5 and the south line of Second Street N 87° 37' 10" E 652.05 ft to a 1-inch galvanized iron pipe for corner in the west line of Richey Street, said pipe also marking the northeast corner of said Lot No. 5;

THENCE with the west line of said Richey Street
S 2° 28' 30" E 1074.36 feet to the place of beginning
and containing 4.761 acres of land,

as described in an instrument (naming Chipman Chemical Company, Inc., as grantor and Houston Lighting & Power Company as grantee) filed in Volume 1574, page 69, of the Deed Records of Harris County, Texas, and;

All of that certain tract or parcel of land containing one and four hundred eighty-two thousandths (1.482) acres, more or less, and being a strip of land 60 feet in width and approximately 1,078 feet in length and extending from the North right of way line of Public Belt Railroad, same being 50 feet North of and at right angle from the South line of Lot Six (6), to the South right of way line of Houston Lighting and power Company's 172 feet in width, same being 172 feet south of and right angles from the North line of Lot Five (5) and adjoining the East line of and being adjacent to Lot Four (4) and being all of the West 60 feet of Lots Six (6) and Five (5), outlot Thirty-five (35) in the City of Pasadena, a subdivision of William Vince Survey, Abstract No. 78, Harris County, Texas, save and except that portion off the South end of Lot Six (6) thereof owned by Public Belt Railroad, save and except that portion off the North end of Lot Five (5) thereof owned by Houston Lighting and Power Company. Said Lots Six (6) and Five (5) being described in that certain deed dated February 11, 1947, from Stauffer Chemical Company by Vice President to Chipman Chemical Company, Inc., and recorded in Volume 1563 page 482, Deed Records of Harris County, Texas, to which deed and records thereof reference is here made for further description,

as described in an instrument (naming Chipman Chemical Company, Inc., as grantor and Texas Pipeline Company as grantee) filed in Volume 1824, page 279, of the Deed Records of Harris County, Texas;

It is further ORDERED that the word "discharge," as used above, includes to deposit, conduct, drain, emit, throw, run, allow to seep., or otherwise release or dispose of; or to allow, permit or suffer any such act or omission; and, That the term "industrial waste" as used above, means water borne liquid, gaseous or solid substances that result from any process of industry, manufacturing, trade or business, both as defined in the Texas Water Quality Act.

It is further ORDERED, ADJUDGED and DECREED that the Defendant, Rhodia, Inc., shall pay all costs of suit, said Defendant having waived the issuance and service of a formal writ of injunction by the Clerk, no such writ shall issue,

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but this judgment and the injunctive orders herein are effective immediately, without further service or notice, from and after the date of entry of this Judgment; and no bond shall be required of Plaintiffs, they being exempt from such security by Article 279(a), V.A.T.S., and the said penalties having been paid no execution shall issue therefrom.

SIGNED, RENDERED and ENTERED this 9th day of August, 1971.

ARTHUR C. LESHER, JR., Judge

APPROVED:

JOE RESWEBER
County Attorney
Harris County, Texas

By _____
GUS DRAKE
Assistant County Attorney

By _____
JAMES R. DOXEY
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF,
HARRIS COUNTY

CRAWFORD C. MARTIN
Attorney General of Texas

By _____
A. J. GALLEGHANO
Assistant Attorney General

ATTORNEYS FOR PLAINTIFF,
TEXAS WATER QUALITY BOARD

BASKIN, FAKES AND STANTON

By _____
STANLEY D. BASKIN

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RHONDIA v. HARRIS COUNTY ET AL (08/05/71)

THE FIRST COURT OF CIVIL APPEALS, HOUSTON

August 5, 1971

RHONDIA, INC., APPELLANT
v.
HARRIS COUNTY ET AL, APPELLEES.

Appeal from District Court of Harris County

Author: Peden

Appeal from the granting of a temporary mandatory injunction against Rhodia, Inc., a chemical company which produces insecticides, weed killers and similar products containing arsenic.

Harris County brought this cause of action under the Texas Water Quality Act, Article 7621 d - 1, Vernon's Texas Civil Statutes, seeking temporary and permanent injunctions and civil penalties, charging that Rhodia was discharging wastes containing excessive arsenic into or adjacent to Vince Bayou, one of the public waters of Texas. The Texas Water Quality Board filed an intervention in which it also sought to have Rhodia enjoined from unauthorized discharges of wastes containing arsenic in violation of the Act.

The appellant does not complain of the trial court's having ordered, after a hearing, that Rhodia be temporarily enjoined from all activities at its plant which will produce arsenic laden water drainage into or adjacent to, the waters of Vince Bayou, a public body of water near the Rhodia plant. Rhodia's appeal is directed to the following mandatory provisions in the temporary injunction:

"Further, that the Defendant, Rhodia, Inc., is hereby ORDERED forthwith to:

"1. Repair in a good and workmanlike manner with tamped, arsenic free soil those breeches existing in the high ground separating Vince Bayou from the tidal flats adjacent to Defendant's property. Place such additional dikes as are necessary to prevent the entry of water into such tidal flats at periods of high tide.

"2. Core that portion of property owned by Houston Lighting & Power Company to the North and East, immediately adjacent and contiguous to the land owned by the Defendant at intervals of 25 feet to such a depth as is necessary to achieve arsenic free soil, filling the core holes with a solution of slaked lime. Remove all arsenically contaminated top soil and replace same with that by-product or waste product from cement manufacturing processes known as 'precipitator dust' to a depth of four inches. After which the arsenically contaminated soil removed from the Houston Lighting & Power Company property may be replaced on top of the aforesaid 'precipitator dust.'

"3. Core the perimeter of the Defendant's property on the South and West boundary at 50 feet intervals to a depth of one foot or until arsenic free soild is achieved.

"4. Core the East perimeter of Defendant's property from the Southern boundary line to the entrance leading to Defendant's plant site at intervals of 50 feet to a depth of one foot or until arsenic free soil is achieved.

"5. Core the remainder of the East boundary line and the North boundary line at intervals of 25 feet to a depth of 2 feet or until arsenic free soil is achieved.

"6. Core the portion of Defendant's property South of the Southern most building thereon at 50 feet intervals (not previously cored) to a depth of 1 feet or until arsenic free soil is achieved, being the South 150 feet of said property.

"7. Core, on a line not more than 4 feet from all concrete buildings, dikes and other operating areas on Defendant's property, at intervals of 25 feet to a depth of 2 feet or until arsenic free soil is achieved. On a line parallel to such line, not separated more than 25 feet from such line and further removed from said concrete buildings, dikes and other operating areas, core at intervals of 25 feet to a depth of 2 feet or until arsenic free soil is achieved.

"8. Remove the arsenically contaminated soil from the slag waste pile, located on the Northerly side of Defendant's property and the Southerly side of the adjoining property owned by Houston Lighting & Power Company, the evaporation pit area, located on Defendant's property, and the railroad spur line unloading area and place in a good and workmanlike manner on the previously prepared tidal flat areas described in No. 1 hereof.

"9. Fill all core holes with slaked lime solution.

"10. All core holes mentioned herein are to be 4 inches in diameter.

"11. Determine the source of the water surfacing in the artesian spring located ten feet North of the North end of the Defendant's railroad spur track.

"12. Cover replaced soil and all areas from which soil is removed with arsenic free compacted earth to a depth of natural ground level. The surface of these areas should be graded smooth in such a manner as to allow proper drainage and not cover any currently exposed transmission tower foundations or footings. These areas should be seeded thereafter with Bermuda grasses so as to avoid erosion."

No findings of fact or conclusions of law were made in addition to those stated in the trial court's order.

At the hearing on the applications for temporary injunction, evidence was introduced that arsenic in excess of the concentration permitted by the "Hazardous Metals Regulation" of the Texas Water Quality Board (one part per million) had been found in the tidal waters of Vince Bayou where natural drainage from the Rhodia plant would carry it and in the fluids being discharged from the Rhodia plant into the City of Pasadena sewer system. There was evidence that the arsenic found in the sewer system originated in the operation of the plant and that it would also eventually reach Vince Bayou but that it would by then be less concentrated. There was also evidence that excessive concentrations of arsenic were found in Vince Bayou as a result of a recent purging of the plant's sprinkler system. However, it appeared from the evidence that one of the principle sources of arsenic in the bayou was that which had, at some time in the past, been deposited on the properties of both Rhodia and the adjacent property of Houston Lighting & Power Co. by operation of Rhodia's plant and was being washed into the bayou by rains and by high tides. Large concentrations of arsenic were found on and in the soil of Rhodia's plant and that of the property of Houston Lighting & Power Co.

Rhodia's corporate predecessor formerly had permission from the Texas Water Quality Board to dump certain of its wastes containing arsenic in a pit and a ditch on its own property, but it sought and obtained cancellation of its permits in 1969 because it had developed a recycling system for its wastes and no longer wished to dump them. It did not appear from the evidence that Rhodia is now knowingly depositing arsenic on the land or in the bayou.

In 1947 Rhodia's predecessor conveyed to Houston Lighting & Power Co. a 4.761 acre strip of land on the north and east sides of the Rhodia plant. Vince Bayou flows across the northeast part of both the Rhodia and the Houston Lighting & Power Co. tracts, and the evidence showed that after rains the natural drainage flow of surface water from parts of the Rhodia land was across the Houston Lighting & Power Co. tract into and adjacent to Vince Bayou.

Rhodia's single point of error is:

"The trial court abused its discretion in issuing a temporary mandatory injunction in that:

"A. It placed on appellant a burden greater than required for the protection of appellees.

"B. It granted all of the relief available to appellees on the trial on its merits.

filed. Lowe and Archer, Injunctions and other Extraordinary Proceedings (1957) 388-9, ? 363. Since the utility company was not a party to the suit, the trial court did not have jurisdiction over its land and thus lacked authority to enforce its order that Rhodia go onto and perform operations affecting such land. "Jurisdiction is the power to hear and determine the matter in controversy according to established rules of law, and to carry the sentence or judgment of the court into execution." Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063 (Tex.Sup. 1926).

It is conceivable that should Rhodia elect to respond to a mandatory provision such as we have stated by diverting or impounding surface waters, this might give rise to a cause of action by the utility company against Rhodia under the provisions of Art. 7589a, Texas Civil Statutes, if the diversion or impounding damaged the utility company's land. No evidence was presented in the trial court touching on the attitude of that company in this regard, and almost none to indicate whether the company's property might be damaged by Rhodia's taking such action.

When he was asked about possible solutions of problems of the nature encountered in this case, the appellees' expert witness, Dr. Walter A. Quebedeaux, Director of the Pollution Control Department of Harris County, testified that he felt that it is his duty to make such suggestions to the plant in question, but that the actual choice of the method is the duty of the plant. He then testified in detail as to his recommendations, and they comprise the mandatory provisions of the trial court's temporary injunction.

It may be that Rhodia will prefer to follow Dr. Quebedeaux's suggestions as to its land and effect a permanent solution to the problem rather than a temporary one which it might devise, such as placing a temporary covering over its land, but we hold that until there has been an opportunity for a trial of the case on the merits, the appellees are entitled only to have Rhodia stop the flow of arsenic into and adjacent to the public waters and that it was an abuse of discretion for the trial court to order, as temporary relief, that Rhodia engage in extensive coring procedures to discover where arsenic is located, that any arsenic-bearing soil be removed, a neutralizing product be added, the arsenic-bearing soil be replaced, that it be covered with compacted earth and seeded with Bermuda grass, both on its own land and on that of Houston Lighting & Power Co.

In its brief Rhodia relates that it has already complied with a number of the trial court's mandatory provisions and complains of the expense to which it has been and will be put, but evidence of this was not presented in the trial court and is not properly before us on this appeal.

We overrule Section B of Rhodia's point of error on authority of the rule stated in McMurrey Refining Co. v. State, supra, which we have noticed.

We find no merit in Section C of appellant's point of error. Rhodia argues that since the Water Quality Act provides for fines and they constitute an adequate remedy at law, the trial court should not have granted the equitable relief of injunction. Sec. 4.02 (a) of the Act specifically provides for both the remedies of injunction and civil penalty, and it is clear that under the evidence in this case the trial court was entitled to make the presumed finding that the depositing of arsenic in public waters in the concentrations found is so dangerous as to constitute irreparable injury.

We overrule Sections D and E of Rhodia's point of error. It is true that Harris County did not seek mandatory relief in its application, but the petition of the Texas Water Quality Board asked, in the alternative, that Rhodia be enjoined to take such steps as are necessary to alleviate and/or abate the polluted condition of the public water. The record does not reflect that any special exceptions were directed to such pleading or were urged upon the court. We hold that under the provisions of Rule 90, Texas Rules of Civil Procedure, the "defect, omission or fault", if any, of the Water Quality Board's petition in not pleading more specifically as to the type of mandatory relief sought, was waived. McKee v. City of Mt. Pleasant, 328 S.W.2d 224 (Tex.Civ.App. 1958, no writ); Hice v. Cole, 295 S.W.2d 661 (Tex.Civ.App. 1956, no writ).

It is clear that Rhodia received due notice of the allegations and proceedings in question and that a full and extended hearing was held before the trial court issued its order. We find no denial of due process.

We modify the mandatory provisions of the trial court's temporary injunction by substituting for them: Rhodia, Inc., is enjoined during the pendency of this suit to take whatever steps are necessary to prevent surface waters and tidal waters from directly or indirectly carrying arsenic in concentrations of more than one part per million from Rhodia's property into or adjacent to Vince Bayou.

The order of the trial court is, as thus modified, affirmed.

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